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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 1086

THE MOODY BIBLE INSTITUTE OF CHICAGO,
A CORPORATION NOT FOR PROFIT,
Appellant,

vs.

CITY OF CHICAGO, A MUNICIPAL CORPORATION,
Appellee.

SUPREME COURT OF ILLINOIS.

No. 26665.

STATEMENT OF JURISDICTIONAL FACTS.

Pursuant to Rule 12, paragraph 1, of the Rules of the Supreme Court of the United States, THE MOODY BIBLE INSTITUTE OF CHICAGO, a corporation, appellant, presents the following statement, particularly discussing the basis upon which appellant contends that the Supreme Court of

the United States has jurisdiction upon appeal to review the decree of the Supreme Court of the State of Illinois appealed from herein.

A.

The Statutory Provisions Believed to Sustain the Jurisdiction.

Section 237, of the Judicial Code of the United States, 28 U. S. C. A., Section 344.

B.

The Statute of the State of Illinois, the Validity of Which Is Involved.

As construed by the Supreme Court of the State of Illinois, the provisions of the Local Improvement Act (1941 Ill. Rev. Stats., Chap. 24, Sec. 84-1 to 84-99) violate petitioner's constitutional guarantees under Section 1 of the 14th Amendment to the United States Constitution.

The provisions of this act authorize various municipalities of the State to construct local improvements by special assessment or otherwise and to exercise the power of eminent domain where the construction of the improvement requires the taking or damaging of private property.

C.

The Judgment Appealed From and Application for Appeal.

Judgment was rendered and the opinion of the Supreme Court of the State of Illinois in this case was filed on the 17th day of November, 1942. The motion of appellant for rehearing was denied by the Supreme Court of the State of Illinois on the 13th day of January, 1943, and the judgment of the court thereupon became final. The application for

appeal to this Court is presented herewith by petition, within three (3) months after said judgment became final.

D.

The Nature of the Case, Rulings of the Court and Cases Believed to Sustain the Jurisdiction.

A mandamus suit was filed herein in the Superior Court of Cook County, Illinois, to enforce the constitutional right of the appellant to just compensation in the payment of the balance of $365,782.00 and interest due on the unconditional judgment awarded in its favor against the city of Chicago by the County Court of Cook County in November, 1930, for property taken and damaged in connection with the construction of a local improvement in the City of Chicago.

The claim that the provisions of the Local Improvement Act violated appellant's rights under the due process clause of the State as well as of the Federal Constitutions, has been raised and contended for consistently from the time the suit was filed in the *nisi* court to the entry of the opinion in this Court.

The Supreme Court has repeatedly held that the requirement of "just compensation" requires the reasonably prompt payment of a condemnation judgment. *People* v. *Kelly*, 361 Ill. 54, 58. As consistently urged by the appellant, the refusal of the city to pay the remainder of the judgment for nearly thirteen (13) years deprived appellants of just compensation. It has also been urged that stipulations cannot change the terms of a court's final judgment unless included within and made a part of that judgment. The opinion of the Illinois Supreme Court correctly states that one of appellant's chief contentions was that the stipulation, if used as a bar to the payment of the judgment, was a violation of Section I of the 14th Amend-

ment of the United States Constitution. A constitutional question is, therefore, necessarily involved in this case. *Van Dyke* v. *Ill. Comm. Men's Ass'n,* 358 Ill. 458.

The United States Supreme Court has taken jurisdiction of cases where much less was done to raise the Federal question than was done by the appellant in the case at bar, where it has made five consecutive efforts to secure its constitutional rights. In *Hendersonville Light & Power Co.* v. *Blue Ridge I. R. Co.,* 243 U. S. 563, 61 L. Ed. 900, Justice Holmes said:

> "The respondents in their answer set up that the condemnation in this manner and for the purpose alleged would be the taking of private property without due process of law, in violation of the 14th amendment, and we assume that the record discloses a technical right to come to this court (citing cases). The decision of the Supreme Court in sustaining the condemnation discusses only matters of state law, but the Chief Justice dissenting, intimated that the taking infringed the Constitution of the United States."

The case of *O'Neill* v. *Leamer,* 239 U. S. 245, 60 L. Ed. 249, 263, shows that what petitioner did here is sufficient to present a Federal question. At p. 263 (L. Ed.) the court said:

> "The plaintiffs assailed the Nebraska Statute as repugnant to the state constitution, and further averred that to permit the defendants to construct the ditch would deprive the plaintiffs of their property without due process of law and deny him the equal protection of the laws, in violation of the 14th Amendment * * *"

And at page 264 the court denied the motion to dismiss the writ of error, saying:

> "The defendants in error have moved to dismiss upon the ground that there is no Federal question

> whatever presented by the record. But we think that the plaintiffs sufficiently raised the question whether the appropriation was essentially for private purpose, and hence contrary to the 14th Amendment, as amounting to a deprivation of property without due process of law, and that their contention as to their Federal right in this respect was denied by the state court. In this view, jurisdiction attaches (citing cases) and we pass to the consideration of the statutory plan."

Appellant likewise contends that the very purpose and gist of this suit was to secure just compensation and that the record and pleadings present Federal questions of which the United States Supreme Court has jurisdiction.

The appellant here has invoked the constitutional guarantee for the payment of just compensation for its property taken for public use and the defendant pleads a stipulation which it alleges is a bar to the suit. As found and stated by the Illinois Supreme Court in its opinion herein:

> "In its reply to the answer of the defendants in error and on the trial it was claimed that the stipulation, if used as a bar to payment of the judgment, was a violation of the provisions of the Illinois and Federal constitutions, in that such use was (1) a violation of section 13 of Article II of the Illinois constitution, which provides that just compensation shall be paid for property taken or damaged for public use, and (2) a violation of the Illinois constitution and section 1 of the fourteenth amendment to the constitution of the United States which provide that no person shall be deprived of his property without due process of law."

Appellant's further contention is that the rulings of law by the courts below upon the evidence herein, prevented it from obtaining just compensation for its property, and constituted a violation of its rights to an equal protection of the laws as well as of the right to due process of law under the fourteenth amendment.

The right to exercise the power of eminent domain or condemnation and to take or damage private property for public improvement is inherent in every State. But to satisfy the due process provision of the Federal constitution, proper and adequate provisions must be made for just compensation to be paid to the owners of the property affected. *Cincinnati* v. *Louisville, etc., R. Co.*, 233 U. S. 390; *U. of So. Cal.* v. *Robbins*, 295 U. S. 738.

The taking and damaging of appellant's property in the case at bar, without the payment of full and just compensation therefor, constituted a denial of its right to due process of law under the Federal Constitution. *Appleby* v. *Buffalo*, 221 U. S. 524; *Norwood* v. *Baker*, 172 U. S. 277.

Where a judgment of a State court authorizes the taking of private property for public use without the payment of just compensation, the affirmance of such judgment by the highest court of the State is a denial of the right secured to the owner by the due process clause of the Federal Constitution. *Chicago, etc., R. Co.* v. *Chicago*, 166 U. S. 226.

Nor can private property be constitutionally taken for public use at a compulsory price which falls below the measure of just compensation. *U. Rys. & E. Co.* v. *West*, 280 U. S. 234.

As hereinabove already pointed out, a further violation of appellant's constitutional rights under the 14th amendment arose out of the rulings of law upon the evidence herein. Appellant's first contention is that the stipulation upon which appellee relies cannot be used as a bar to defeat the claim for full payment of the compensation as adjudicated by the County Court. It next contends that even if such a stipulation could lawfully be given such effect in a proper case, the evidence herein, introduced by the appellee itself, showed that all of requirements of the stipulation were complied with by appellant and that it was therefore

entitled to full payment of its judgment. There is no evidence in the record to support the ruling of the lower courts to the effect that the stipulation barred appellant's right to collect its judgment in full.

Where a finding of fact is not supported by any evidence, as in the present case, and the finding deprives appellant of a constitutional right, the Supreme Court will review the record. *Interstate Amusement Co.* v. *Albert*, 239 U. S. 500; *Truax* v. *Corrigan*, 257 U. S. 333; *Kansas City Southern R. R. Co.* v. *C. H. Albers Co.*, 223 U. S. 573.

E.

The Federal Questions Involved Are Substantial.

The inherent right of appellant as a property owner in a special assessment proceeding to obtain just compensation for its property, either taken or damaged, and to have access to the courts for the protection of its rights upon the same terms, conditions, and equality with other persons similarly situated, are the issues in this case. The repugnancy of the Local Improvement Act of the State of Illinois to these constitutional rights under the principles contended for herein, has never been adversely determined by this Court, and appellant's contentions are sustained by the numerous decisions of this Court. (See authorities cited under foregoing subdivision.) The questions presented are not frivolous. *Griffith* v. *Connecticut*, 218 U. S. 563, 573.

F.

Questions of Federal Jurisdiction Raised in State Courts.

The foregoing questions of Federal jurisdiction were first raised by appellant in the trial court, as pointed out by the opinion of the Illinois Supreme Court. The questions

were again raised and argued in all of appellant's briefs in the Illinois Supreme Court.

Appellant contends that the construction placed upon the provisions of the Local Improvement Act, applicable to the facts involved in the case at bar, violated appellant's rights under the fourteenth amendment to the Federal Constitution. To the best of appellant's knowledge, these questions have never been passed upon by the Supreme Court of the United States.

The question of the repugnancy of the involved provisions of the Local Improvement Act to the 14th amendment to the Federal Constitution was fairly and timely raised, is presented by the record and was necessary to a determination of the cause. *Chapman* v. *Goodnow's Admr.*, 123 U. S. 540, 548; *Murray* v. *Charleston*, 96 U. S. 232; *C. B. & Q. R. R. Co.* v. *Chicago*, 166 U. S. 226; *Sulley* v. *American National Bank*, 178 U. S. 289.

Alternative Prayer for Writ of Certiorari and for Time to File Briefs in Support Thereof.

Appellant prays that in the event that this Honorable Court finds that the record and pleadings herein fail to disclose a jurisdictional question reviewable by this Court on appeal, that the case may then be considered as an application for a writ of certiorari and that appellant be allowed reasonable time within which to file its brief in support thereof.

Respectfully submitted,

HOWARD F. BISHOP,
Attorney;
WARREN H. ORR,
Of Counsel.

APPENDIX "A".

Docket No. 26665—Agenda 25—May, 1942

The People *ex rel.* The Moody Bible Institute of Chicago, Plaintiff in Error, *v.* The City of Chicago et al., Defendants in Error.

Mr. Justice Fulton delivered the opinion of the Court:

The plaintiff in error was awarded a judgment in the county court of Cook county against the city of Chicago on November 28, 1930, in the sum of $896,227 to compensate it for the taking and damaging of certain property belonging to it on La Salle Street in said city. Shortly after the entry of the judgment, the city paid $530,445 thereof, leaving unpaid the principal amount of $365,782.

In the present cause the plaintiff in error filed a *mandamus* action in the superior court of Cook county to compel the city of Chicago to pay the unpaid portion of the judgment. The city filed an amended counterclaim, wherein it alleged that by reason of a breach of an agreement on the part of the Moody Institute to remove obstructions from the land condemned, the city was entitled to damages equivalent to interest on the amounts paid upon the judgment awards. The trial court refused to award the *mandamus* writ for the payment of such balance and also found against the city on it amended counterclaim. An appeal was taken to this court by plaintiff in error, but the notice of appeal was preceded by a notice of appeal filed two days before by the defendants in error, taking an appeal to the Appellate Court. The appeal to this Court was therefore dismissed "without prejudice." The plaintiff in error then directed its attention to the Appellate Court, First District. There it moved the Appellate Court to transfer the cause to this court on the ground that constitutional questions were involved. The motion was taken with the case by the Appellate Court and on November 29, 1941, that court filed an opinion denying the motion on the grounds that no constitutional questions were involved, and also affirming the judgment of the superior court. Thereafter, a petition for leave to appeal was filed in this court by the plaintiff in

error, and on January 20, 1942, leave to appeal was denied. The plaintiff in error now brings the present writ of error seeking to have the case reviewed in this court. The defendants in error have filed a motion to dismiss the writ of error, which motion was taken with the case, and briefs of both parties have been filed in this cause.

On October 6, 1930, the plaintiff in error and the city of Chicago entered into a stipulation, the purpose of which by its terms was to compromise and settle the condemnation suit then pending between the parties in the Supreme Court of the United States. The stipulation was made a few weeks prior to the entry of the condemnation judgment, for which payment is sought by this action, but was never filed in the cause nor made a part of the record in the county court of Cook county. On the trial of this *mandamus* suit, the superior court admitted the stipulation in evidence over objection of plaintiff in error. In the answer of the defendants in error to the petition for writ of *mandamus*, the stipulation was set up as a matter of defense to the immediate payment of the balance of the condemnation judgment. By the terms of the stipulation the City of Chicago agreed to set aside all verdicts and judgments theretofore rendered in the condemnation suit, and to permit evidence to be presented to the county court in a subsequent hearing, the effect of which was to increase the judgment and awards to plaintiff in error by a sum in the neighborhood of $350,000. By its further terms the stipulation provided that plaintiff in error would remove all obstructions, or submit to the Board of Local Improvements a *bona fide* contract for their removal, from the part of its properties taken in the condemnation proceeding. It was the contention of the city of Chicago that it was not compelled to pay the balance of the judgment until the plaintiff in error had removed such obstructions. There was the further provision in the stipulation that the city should pay plaintiff in error in cash the amounts originally allowed in the findings and judgment on each piece of property in the condemnation suit, after deducting therefrom the assessments originally confirmed against the remainder of such properties; that upon such payments being made the plaintiff in error would surrender to the city of Chicago the property taken for the

contemplated improvement, and have orders entered in the condemnation proceeding permitting the city to take possession of such properties.

The partial payments, amounting to $530,445, were made by the city and it entered into possession of the property sufficiently to complete the paving portion of the project but was unable to proceed with the sidewalk portion of the improvement because of the building structures remaining on that portion of the condemned property.

It is insisted by the plaintiff in error that this is its first clear opportunity to present the constitutional questions involved in the case to this court. In its reply to the answer of the defendants in error and on the trial it was claimed that the stipulation, if used as a bar to payment of the judgment, was a violation of the provisions of the Illinois and Federal constitutions, in that such use was (1) a violation of section 13 of Article II of the Illinois constitution, which provides that just compensation shall be paid for property taken or damaged for public use, and (2) a violation of the Illinois constitution and section 1 of the fourteenth amendment to the constitution of the United States which provide that no person shall be deprived of his property without due process of law. The same constitutional questions were again raised by cross appeal in the Appellate Court. On the motion to transfer made in that court, it was further urged that the Appellate Court had no jurisdiction on review because the proceeding was a continuation of the local improvement proceeding in which the judgment herein sought to be enforced was rendered, and therefore only a direct appeal to the Supreme Court was proper.

In support of their motion to dismiss the writ of error, the defendants in error contend that the only method of obtaining a review by plaintiff in error from the judgment of the Appellate Court is by petition for leave to appeal, or certificate of importance, except where writ of error is preserved by section II of article VI of the constitution, and that no debatable constitutional question is involved in this case.

After a careful review of the record we believe the motion to dismiss is well taken. It is conceded that if no stipulation had been entered into, the taking of property with-

out paying the full amount of the condemnation judgment would have been a violation of the constitutional rights of the plaintiff in error. (Const. of 1870, sec. 13, art. II; *People ex rel. Farwell Co.* v. *Kelly*, 361 Ill. 54; *Eldred Drainage and Levee District* v. *Wilcoxson*, 365 id. 249.) Those authorities all support the well known constitutional protection that "private property shall not be taken or damaged for public use without just compensation," and that the constitutional guaranty is not satisfied by the judgment alone, but only by the payment of it. But the city of Chicago and the plaintiff in error saw fit to enter into a written contract or stipulation wherein and whereby very substantial questions and differences of opinion were compromised, settled and agreed upon, which creates an entirely different situation from the facts set forth in the above mentioned cases. The situation in this case is quite different from the facts in *People ex rel. First Nat. Bank* v. *Kingery*, 368 Ill. 205. In that case a clear constitutional question was involved because a property owner sought by *mandamus* to compel the Director of the Department of Public Works and Buildings to institute proceedings to ascertain damages due to a separation of grades on a highway extending along two sides of her property. The trial court awarded the writ, and the appeal was improperly taken to the Appellate Court, where the judgment of the lower court was reversed. A petition for leave to appeal was filed in this court and granted, even though there had been no motion for transfer made in the Appellate Court and although that court had no jurisdiction to hear the appeal. In the present case a motion to transfer was made in the Appellate Court and denied and later the judgment against plaintiff in error affirmed. It thereupon filed a petition for leave to appeal, asking this court to assume jurisdiction for the purpose of determining the alleged constitutional questions just as though the order of transfer had been made, or, in the alternative, if it considered that no constitutional questions were presented, to grant leave to appeal. This court thereupon denied leave to appeal.

The position of plaintiff in error that the judgment was final and unconstitutional and that the stipulation entered into before the judgment is no limitation or restriction whatever upon the judgment, since the stipulation was en-

tirely omitted from the record in that case, presents questions that were very properly considered by the Appellate Court. They involve the interpretation and effect of the stipulation and kindred questions concerning the validity of the judgment and do not necessarily raise a constitutional question.

The contention of plaintiff in error that this *mandamus* proceeding is, to all effects and purposes, a continuation of the original proceeding under the Local Improvement Act, so as to fall within the provisions of section 95 of that act (Ill. Rev. Stat. 1941, chap. 24, par. 84-95), providing that appeals from final judgments or orders may be taken to the Supreme Court, is not sound. In *McBane* v. *People ex rel. Stout*, 50 Ill. 503, a petition for *mandamus* was held to be an original suit.

No other questions different from those contained in the petition for leave to appeal are included in the present writ of error. All other questions presented by the petition are again presented by the writ of error and no such method or manner of appeal is provided by either the statutes of the State of Illinois or the constitution. Sec. 75 Civil Practice Act; Ill. Rev. Stat. 1941, chap. 110, par. 199; Const. of 1870, sec. II, art. VI.

The writ of error is therefore dismissed.

Writ of error dismissed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 1086 95

THE PEOPLE OF THE STATE OF ILLINOIS on relation of THE MOODY BIBLE INSTITUTE OF CHICAGO, a corporation not for profit, Appellant, vs. CITY OF CHICAGO, a municipal corporation, et al., Appellees.	Appeal from the Supreme Court of Illinois No. 26665.

APPELLANT'S REPLY TO APPELLEE'S STATEMENT AGAINST JURISDICTION AND MOTION TO DISMISS OR AFFIRM and ALTERNATIVE PRAYER FOR WRIT OF CERTIORARI.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

NO.

THE PEOPLE OF THE STATE OF ILLINOIS on relation of THE MOODY BIBLE INSTITUTE OF CHICAGO, a corporation not for profit, Appellant, vs. CITY OF CHICAGO, a municipal corporation, et al., Appellees.	Appeal from the Supreme Court of Illinois No. 26665.

APPELLANT'S REPLY TO APPELLEE'S STATEMENT AGAINST JURISDICTION AND MOTION TO DISMISS OR AFFIRM and ALTERNATIVE PRAYER FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The appellant, The Moody Bible Institute of Chicago, a corporation not for profit, hereby respectfully presents its reply to appellee's statement against jurisdiction and its motion to dismiss or affirm, served on appellant April 19, 1943:

As pointed out in appellant's jurisdictional statement (R. 43) and in the opinion of the Illinois Supreme Court,

appealed from herein (R. 46), the constitutional questions which appellant contends confer jurisdiction upon this Court on this appeal, were first raised in the trial court and subsequently urged in both the State Appellate and Supreme Courts. Appellee concedes (R. 68) "that from the very outset the appellant has asserted a Federal question."

In the State Appellate Court appellant contended that said court was without jurisdiction to pass upon the constitutional questions involved herein. After that court overruled appellant's contention on that point and rendered its decision, appellant filed a petition for leave to appeal in the State Supreme Court for a review of the decision of the Appellate Court. Upon the denial of said petition for leave to appeal appellant sought to avail itself of its right to a review of the Appellate Court judgment in the State Supreme Court by writ of error, as provided by Sec. 11 of Art. VI of the Illinois Constitution.

One of the contentions of appellant on this appeal is that the eminent domain provisions of the Illinois Local Improvement Act (1941 Ill. Rev. Stats. Ch. 24, Sec. 84-1 to 84-99), as construed by the courts below, are invalid in that they violate appellant's constitutional guarantees under Sec. 1 of the Fourteenth Amendment to the Federal Constitution. Sec. 11 of Art. VI of the Illinois Constitution provides that appeals and writs of error shall lie from the appellate courts to the State Supreme Court in cases where the validity of a statute is involved. Until the State Supreme Court passed upon appellant's right to a review of the Appellate Court judgment there was no final and appealable judgment or decree terminating the litigation between the parties on the merits of the case, of which this Court could take jurisdiction (*Georgia Ry.* v. *Decatur,* 262 U. S. 432, 437.)

I.

To satisfy the due process provision of the Federal Constitution in Eminent Domain proceedings, not only must a fair and adequate hearing be provided for the ascertainment of just compensation to be paid the owner for the property taken or damaged, but the compensation, when the amount thereof is determined, must actually be paid.

The condemnation proceeding wherein the amount of compensation due appellant herein was determined, was concluded on November 28, 1930 (R. 22). Since that time, for a period of almost 13 years, appellee has consistently refused to pay appellant the principal sum of $365,782, and interest thereon, due under said condemnation award. There is no meritorious or legal excuse for the withholding of this portion of the compensation found to be due appellant. Appellee contends, however, that it is justified in refusing to pay the balance of appellant's award because appellant has failed to perform its part of a certain stipulation.

Before the amount of the award was determined in the trial court appellant agreed to remove a portion of its buildings from the property condemned or "to submit to the Board of Local Improvements (of the city of Chicago) a *bona fide* contract for their removal" (R. 23). This agreement, which appears on pages 16 to 21 of the printed abstract of record (R. 3), was not filed in the condemnation proceeding and formed no part of the judgment award entered therein nor was it even mentioned or referred to in the condemnation judgment. Within a short time after the agreement was made, appellant complied with its terms by submitting a *bona fide* contract for the removal of the buildings in question to the said Board of Local Improvements. This contract, which appears on pages 70

and 71 of the printed abstract of record (R. 3), was produced by appellee from its own files and introduced in evidence by appellee in the trial court. There is no denial regarding the prompt and proper submission of the contract to the Board, nor is there any question as to its being *bona fide*. Appellant's complete compliance with the terms of the agreement therefore stands admitted, and no legal or equitable reason exists, under which appellant's conduct, in refusing to pay the balance of the award, can be excused.

Appellant's contention that this court has jurisdiction of this appeal under Section 237 of the Judicial Code of the U. S. (28 U. S. C. A., Sec. 344) is based on the following theory:

(1) The decision appealed from is a final judgment rendered by the highest court of the State of Illinois in which a decision in the suit could be had;

(2) In the courts below, there was properly raised and presented a question as to the validity of the eminent domain provisions of the Illinois Local Improvement Act (1941 Ill. Rev. Stats., Chap. 24, Sec. 84-1 to 84-99), on the ground of their being repugnant to the due process clause of the Federal Constitution, and the decision was in favor of their validity.

Appellant does not complain that it failed to obtain a hearing in the condemnation proceeding, nor does it question the sufficiency of the amount adjudged by the trial court to be its just compensation for the property taken and damaged. It does contend however, that the refusal of the appellee never to pay the full amount of appellant's award constitutes a denial of due pro-

cess under the Federal Constitution. If a State law, which confers the power of eminent domain upon municipalities, lends itself to a construction permitting such an evasion of the full payment of the award allowed, then such law must be unconstitutional under Section 1 of the Fourteenth Amendment to the United States Constitution. The courts below having decided in favor of the validity of the eminent domain provisions of the State Local Improvement Act in this respect, the case is properly before this court on appeal.

This court has held that where a judgment of a State court authorizes the taking of private property for public use without the payment of just compensation, the affirmance of such judgment by the highest court of the State is a denial of the right secured to the owner by the due process clause of the Federal Constitution. *Chicago, etc. R. Co.* v. *Chicago,* 166 U. S. 241.

It has also been held by this Court that to satisfy the due process provision of the Federal constitution, proper and adequate provisions must be made for just compensation to be *paid* to the owners of the property affected. *Cincinnati* v. *Louisville etc. R. Co.,* 233 U. S. 390; *U. of So. Cal.* v. *Robbins,* 295 U. S. 738.

In its motion to dismiss, appellee argues that the constitutional requirements of due process were complied with in this case, because appellant was afforded an adequate hearing in the condemnation proceeding and was awarded an ample sum for the damages it sustained. The matter of payment of the award is treated by appellee as a separate and distinct element, unrelated to the taking and damaging of appellant's property. The fallacy of this argument is clear, for the taking or damaging of private

property in a condemnation proceeding and the payment of the damages awarded the property owner therefor, constitutes a single, inseparable transaction. The three essential elements are (1) a proper hearing; (2) an adequate award for the damages sustained; and (3) a prompt payment of the award. Of what value is a proper hearing and an adequate award if the award is never paid? The lack of this indispensable element creates a mockery and a sham out of the whole proceeding and results in the taking of property without due process of law contrary to the provisions of the Federal constitution.

Because the eminent domain provisions of the Illinois Local Improvement Act, as construed by the Illinois Supreme Court permit such an evasion of a payment of a judgment award in a condemnation proceeding, they are invalid in that they violate Sec. 1 of the Fourteenth Amendment to the Federal Constitution.

ALTERNATIVE PRAYER FOR WRIT OF CERTIORARI.

A further violation of appellant's constitutional rights arose out of the rulings of law upon the evidence herein.

Appellee bases its entire defense upon two documents, *i.e.* (1) a stipulation, entered into between appellant and appellee before the entry of the judgment award providing (a) for the removal by the appellant of a portion of the buildings on the land condemned, or (b), *"the submission to the Board of Local Improvements of a bona fide contract for their removal"*; and (2) the said contract for the removal of said buildings. Both of these documents were introduced in evidence by the appellee after being produced from its files. The stipulation appears on pages 16 to 21, and the contract on pages 70 and 71 of the printed abstract of record (R. 3). An examination of these two documents makes it clearly obvious that the submission of the contract to the Board constituted a full compliance with the terms of the stipulation on appellant's part. Furthermore, there is no denial of this by the appellee.

In the decision appealed from herein, the Illinois Supreme Court states:

> "It is conceded that if no stipulation had been entered into, the taking of property without paying the full amount of the condemnation judgment would have been a violation of the constitutional rights of the plaintiff in error." (R. 46).

Although appellant's first contention is that the payment of a judgment award of the type here involved cannot be evaded without a violation of due process of law, it fur-

ther contends that, inasmuch as there has been a full compliance on its part with the terms of the stipulation, no justification for appellee's refusal to pay the award can possibly exist. Although the contract for the removal of the buildings, the submission of which constituted performance on appellant's part, is a part of appellee's own evidence, it is not even metioned in appellee's motion to dismiss. Nowhere in its motion does appellee deny or answer appellant's contention, set forth on pages 6 and 7 of its jurisdictional statement (R. 41, 42), that it had fully complied with its agreements under said stipulation. It is obvious, therefore, that the defense of non-compliance with the terms of the stipulation has not been proved and is not made in good faith and that said stipulation is no defense to this action of mandamus based on the condemnation judgment.

Appellant contended in the courts below, and still contends, that the stipulation in question was inadmissible to vary the terms of the final and unconditional condemnation judgment and that any agreements entered into prior to the entry of said judgment were merged therein. For this reason appellant objected to the introduction of the stipulation and contract in evidence by appellee in the trial court. Inasmuch however as the two documents clearly show a full compliance under the stipulation on appellant's part, there is no evidence in the record to support appellee's defense.

Further proof of appellant's compliance with the terms of the stipulation can be found in the testimony of one of appellee's own witnesses, Michael J. Faherty, who testified (pp. 60-61 of the printed abstract of record, R. 3) that he was the president of the Board of Local Improvements when the contract for the removal of the buildings

was submitted; that he had charge of the negotiations to settle the case and signed the stipulation; that he received the contract on December 30, 1930, and considered it as "the carrying out of the agreement (stipulation) that was entered into"; that he received it "in connection with the settlement of the claims against the City for that property."

The stipulation, being in the alternative, *i.e.*, permitting appellant *either* to remove the obstructions *or* to furnish a contract for their removal, was complied with by appellant when it submitted such a contract. This is the well settled law in Illinois as well as elsewhere. (*Sperry & Co.* v. *Siegel Cooper*, 309 Ill. 193, 200; *Brockton Co.* v. *Lee*, 266 Mass. 550, 556.

There is no evidence in the record to support the ruling of the lower courts to the effect that the stipulation barred appellant's right to collect its judgment in full. In ruling to the contrary, the courts below therefore prevented appellant from obtaining just compensation for its property. This constituted a violation of appellant's rights to an equal protection of the laws, as well as of its right to due process of law under the Fourteenth Amendment.

This court has held that where a finding of fact is not supported by any evidence, as in the present case, and the finding deprives appellant of a constitutional right, the Supreme Court will review the record. *Interstate Amusement Co.* v. *Albert*, 239 U. S. 500; *Truax* v. *Corrigan*, 257 U. S. 312; *Kansas City Southern R. R. Co.* v. *C. H. Albers Co.*, 223 U. S. 573.

In the decision handed down by former Chief Justice Taft in the *Truax* case, this Court (at p. 324) established the rule that:

> "In cases brought to this court from state courts for review, on the ground that a federal right set up in the state court has been wrongly denied, and in which the state court has put its decision on a finding that the asserted federal right has no basis in point of fact or has been waived or lost, this court as an incident of its power to determine whether a federal right has been wrongly denied, may go behind the finding to see whether it is without substantial support. If the rule were otherwise, it almost always would be within the power of a state court practically to prevent a review here."

In *Creswill* v. *Knights of Pythias*, 225 U. S. 246, 261, former Chief Justice White said:

> "While it is true that upon a writ of error to a state court we do not review findings of fact, nevertheless two propositions are as well settled as the rule itself, as follows: (a) that where a Federal right has been denied as the result of a finding of fact which it is contended there was no evidence whatever to support and the evidence is in the record the resulting question of law is open for decision * * *."

Northern Pacific R. R. v. *North Dakota*, 236 U. S. 585, 593; and *Postal Tel. Cable Co.* v. *Newport*, 247 U. S. 464, are to the same effect.

Appellant therefore prays that, in the event that this Honorable Court finds that the record and pleadings herein fail to disclose a jurisdictional question reviewable by this court on appeal, the case may then be considered as an application for a writ of certiorari and that appellant be allowed reasonable time within which to file its brief in support thereof.

Respectfully submitted,

HOWARD F. BISHOP,
Attorney for Appellant.

WARREN H. ORR,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 1086 95

THE MOODY BIBLE INSTITUTE OF CHICAGO,
Appellant,

vs.

CITY OF CHICAGO.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

BARNET HODES,
Corporation Counsel of the City of Chicago;
JOSEPH F. GROSSMAN,
First Assistant Corporation Counsel;
J. HERZL SEGAL,
Assistant Corporation Counsel,
Counsel for Appellee.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 1086

THE PEOPLE OF THE STATE OF ILLINOIS ON RELATION OF THE MOODY BIBLE INSTITUTE OF CHICAGO, A CORPORATION NOT FOR PROFIT,

Appellant,

vs.

CITY OF CHICAGO, A MUNICIPAL CORPORATION, ET AL.,

Appellees.

APPEAL FROM THE SUPREME COURT OF ILLINOIS, No. 26665.

STATEMENT BY APPELLEES OF MATTERS AND GROUNDS MAKING AGAINST THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES.

MAY IT PLEASE THE COURT:

The appellees, City of Chicago, a municipal corporation, et al. respectfully present to the court the following matters and grounds making against the jurisdiction of the

Supreme Court of the United States as asserted by the appellant herein in its statement of jurisdictional facts filed herein on the 6th day of April, 1943, and served upon the appellees on the 10th day of April, 1943, as required by Rule 12 of this honorable court:

Statement of the Case.

The statement of jurisdictional facts refers only to the opinion of the Supreme Court of the State of Illinois filed in this case on the 17th day of November, 1942, which opinion is appended to the statement of jurisdictional facts. As will appear from this opinion (which is officially reported under the title *The People ex rel. The Moody Bible Institute of Chicago, plaintiff in error* v. *The City of Chicago, et al., defendants in error,* in 382 Ill. 70) the Supreme Court of Illinois did not decide the case upon the merits. That court dismissed a writ of error sued out to the Appellate Court of Illinois, First District, on the ground that no constitutional question was in the case which would support a writ of error. The highest court of review which considered this case on the merits was the Appellate Court of Illinois, First District. Its opinion in this case is officially reported under the title *People ex rel. Moody Bible Institute of Chicago* v. *City of Chicago* in 312 Ill. App. 126. The opinion of this Court contains a complete and correct discussion of the facts upon which the decision rested. The court is respectfully referred to that decision for a full understanding of the facts and issues involved in the State courts. For the convenience of the court a copy of the opinion is appended hereto.

Stated in concise form the facts in the instant case are these: Pursuant to an ordinance of the City of Chicago passed December 23, 1924, proceedings were instituted in the County Court of Cook County under the Local Im-

provement Act of the State of Illinois for the purpose of widening North La Salle Street. The Moody Bible Institute owned three parcels of land on that street. It filed legal objections to the special assessments and the amounts of the proposed condemnation awards. The County Court overruled such objections, the Institute waived further controversy (which was tantamount to a demurrer) and judgment was rendered confirming the assessments against its property and the awards in its favor. The awards for compensation aggregated $519,727.00.

The Institute appealed to the Supreme Court of Illinois which affirmed the judgment. Thereupon proceedings were filed in this Court in an attempt to obtain a review of the judgment of the Supreme Court of Illinois. During the pendency of the proceedings in this Court the parties effected a compromise and entered into a written stipulation whereby the proceedings in this Court were dismissed. The award in favor of the Institute was increased by $350,000.00 and the special assessment against the property of the Institute was reduced by half. Thereafter, pursuant to the stipulation a trial was had in the County Court without a jury and a judgment awarding compensation to the Institute in the aggregate sum of $869,727.00 was entered. Shortly thereafter the city paid to the Institute the amount of the original awards, but refused to pay the increase in the awards until such time as the Institute should remove the portion of the buildings standing upon the strip of land condemned for street widening purposes. This position of the city was based upon the provisions of the written stipulation wherein the Institute agreed to effect such removal.

The present action was filed to compel the payment of that portion of the award remaining unpaid representing the stipulated increase over the sum originally awarded.

The trial court gave full effect to the written stipulation and held that the city was not required to pay the balance until after the Institute had removed its property from the condemned strip of land. The Appellate Court of Illinois affirmed this action of the trial court. The Supreme Court of Illinois denied a petition for leave to appeal thereby affirming the decision of the Appellate Court. Following the denial of the petition for leave to appeal the Institute sued out a writ of error on the theory that an appeal to the Illinois Supreme Court lay as a matter of right because alleged constitutional issues were in the case. The Supreme Court dismissed this writ of error and refused to consider the case on the merits holding that no constitutional questions were involved. It is this last mentioned decision which the Institute seeks to review.

The property of the Institute has not yet been removed from the strip of land condemned by the city.

I.

There has been no denial of due process because the laws of the State of Illinois provide and the appellant has availed itself of a fair and adequate hearing in court for the adjudication of its rights.

The statement of jurisdictional facts filed by appellant devotes considerable space to demonstrating that it has preserved at all stages of the proceedings its assertion that its rights under the Federal Constitution are affected by this proceeding and that the failure of the City of Chicago to pay the balance of the condemnation award deprives appellant of its just compensation. Appellant could more profitably have devoted itself to the task of attempting to demonstrate just how its rights have been infringed. We concede that from the very outset the appellant has as-

serted a Federal question. We contend, however, that the case presents no impairment of any rights of the appellant guaranteed by the due process clause of the Federal Constitution.

We are at a loss to understand the precise theory upon which appellant asserts that it has been deprived of its property without due process of law. Appellant bases its right to appeal to this Court upon the provisions of Section 237 of the Judicial Code of the United States (28 U. S. C. A., Section 344) which so far as is material to this case provides:

> "(a) A final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had, * * * where is drawn, in question the validity of a statute of any state, on the ground of its being repugnant to the constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error."

In an effort to bring itself within the scope of this provision of the Judicial Code, appellant asserts that the Local Improvement Act of the State of Illinois as construed by the Supreme Court of the State violates petitioner's rights under Section 1 of the Fourteenth Amendment to the United States Constitution. Appellant refers to the entire Local Improvement Act (1941 Ill. Rev. Stats., chap. 24, sec. 81-1 to 84-99) in subdivision B of its jurisdictional statement. No further reference to the statute is made anywhere in the jurisdictional statement and it is not pointed out precisely which of the 99 sections of the Local Improvement Act results in an infringement of appellant's rights under the Federal Constitution. The obvious explanation is that the statute is free from any constitutional objection. The Local Improvement Act of the State of Illinois prescribes the well established and orthodox procedure for

condemning property for local improvements with adequate provision for hearings in court to determine the amount of compensation and the amount of the assessment against property benefited. In the case at bar proper proceedings were had, the appellant was duly represented in court by competent counsel and the award ultimately given it and the assessment levied against it were agreed upon between the appellant and the condemnor. There is accordingly not present in this case the question of compensation or assessment contrary to the volition of the property owner. The appellant is completely satisfied with the compensation awarded it and makes no complaint on that account. It received over a half million dollars on account, still has possession of the property, and is seeking payment of the balance of the award. It sole complaint is that failure on the part of the city to pay the balance and the decision of the court in upholding the city's refusal to pay the balance deprives appellant of property without due process of law. The unsoundness of that contention appears evident.

The Local Improvement Act is not and cannot be involved in this case. The proceedings thereunder have fully terminated and in a manner which is entirely satisfactory to appellant. The present suit forms no part of the proceedings under the Local Improvement Act. The Supreme Court of Illinois in its opinion in this case squarely so holds (382 Ill. 70, 76). The Supreme Court of Illinois considers this mandadmus action to collect the award an original suit and not a continuation of the proceeding under the Local Improvement Act. This holding is manifestly a sound holding, but even if it were not, that holding relates to a matter of procedure, is a local question and is accordingly not subject to review by this court. In any event no deprivation of property without due process results because it is im-

material whether the proceeding be regarded as a continuation of the proceeding under the Local Improvement Act or an original suit so long as an adequate remedy is afforded for the collection of the award. The only section of the Local Improvement Act which can possibly be considered pertinent to the issues in this case is section 84-32 (Ill. Rev Stats. 1941, chap. 24, par. 84-32) which in substance provides that if the condemnor does not elect within 90 days after final judgment to dismiss the proceeding and elects to enter judgment on the verdict it becomes bound thereby to pay the amount thereof whether the assessment is collected or not and the judgment of condemnation shall not be conditional. This section of the Local Improvement Act has been uniformly held by the Supreme Court of Illinois to result in a *quod recuperet* judgment payable at all events by the condemnor. (*Turk v. City of Chicago*, 352 Ill. 171; *Feldman* v. *City of Chicago*, 363 Ill. 247.) The Supreme Court of Illinois has further held that this judgment is payable even though physical possession of the property is not surrendered to the condemnor (*People ex rel. Wieboldt Stores, Inc.* v. *City of Chicago*, 368 Ill. 421) and in the opinion in the instant case the Supreme Court of Illinois held (382 Ill. 70, 74-75):

> "It is conceded that if no stipulation had been entered into, the taking of property without paying the full amount of the condemnation judgment would have been a violation of the constitutional rights of the plaintiff in error (Constitution of 1870, Section 13, Article II; *People ex rel. Farwell Company* v. *Kelly*, 361 Ill. 54; *Eldred Drainage and Levy District* v. *Wilcoxon*, 365 id. 249). These authorities all support the well known constitutional provision that 'private property shall not be taken or damaged for public use without just compensation,' and that the constitutional guaranty is not satisfied by the judgment alone, but only by the payment of it."

It appears therefore that so far as the constitution of the State of Illinois and the statutes of the state relating to the condemnation of property are concerned as construed by the Supreme Court of Illinois, the rights of the property owner are protected in the broadest possible manner. Private property cannot be taken for a public use except after due process, the determination of just compensation, and the actual and prompt payment thereof.

These conditions satisfy the requirements of the Federal constitution in cases of this nature. As was said by this court in *Appleby* v. *Buffalo*, 221 U. S. 524 (one of the cases cited by appellant in its jurisdictional statement) at page 532:

> "The only assignment of error which is here open to review does not show that the court below, by any ruling of law, deprived the owner of the right of compensation for his property. The alleged denial of Federal right rests upon the assertion that the damages were nominal, while the property taken was of greater value. But, as this court has heretofore held, if the state has provided adequate machinery for the ascertainment of compensation, upon notice and hearing, and the record discloses no ruling of law which prevented compensation to the owner for the property taken, there is no lack of due process."

Under these circumstances the complaint of the appellant in this case must necessarily resolve itself into the charge that the decision of the court is erroneous.

This does not constitute a deprivation of due process. The Fourteenth Amendment to the constitution of the United States does not guarantee correct decisions by the state courts. All that the constitution guarantees is a fair and adequate hearing. The fundamental principles in this respect are well defined in *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 112. At page 157 this court said:

"It was never intended that this court should, as the effect of the amendment, be transformed into a court of appeal, where all decisions of state courts involving merely questions of general justice and equitable considerations in the taking of property should be submitted to this court for its determination. The final jurisdiction of the courts of the states would thereby be enormously reduced and a corresponding increase in the jurisdiction of this court would result, and it would be enormously reduced and a corresponding increase in

The following decisions of this court similarly declare that where the parties have been fully heard in the regular course of judicial proceeding, an erroneous decision of the state court does not deprive the unsuccessful party of his property without due process of law within the Fourteenth Amendment of the Constitution of the United States:

Central Land Company v. *Laidley*, 159 U. S. 103, 112;
Arrowsmith v. *Harmoning*, 118 U. S. 194, 196;
Patterson v. *Colorado*, 205 U. S. 454;
In re Converse, 137 U. S. 624, 631.

The soundness of our analysis of appellant's position is disclosed by the following excerpts from appellant's jurisdictional statement:

"Appellant's further contention is that the rulings of law by the courts below upon the evidence herein, prevented it from obtaining just compensation for its property, and constituted a violation of its rights to an equal protection of the laws as well as of the right to due process of law under the Fourteenth Amendment. * * *

"As hereinabove already pointed out, a further violation of appellant's constittuional rights under the Fourteenth Amendment arose out of the rulings of law upon the evidence herein. Appellant's first contention is that the stipulation upon which appellee relies cannot be used as a bar to defeat the claim for full payment of the compensation as adjudicated by the

> County Court. It next contends that even if such a stipulation could lawfully be given effect in a proper case, the evidence herein, introduced by appellee itself, showed that all of the requirements of the stipulation were complied with by appellant and that it was therefore entitled to full payment of its judgment. There is no evidence in the record to support the ruling of the lower courts to the effect that the stipulation barred appellant's right to collect its judgment in full."

It is abundantly clear from the foregoing that the essence of appellant's complaint is that the court reached an erroneous conclusion upon the admitted facts. In view of the decisions of this court above cited, this provides no basis for a review of the decision by this court.

Our reliance upon those authorities does not mean that we concede for one moment that the trial court or the courts of review were not completely justified in their decisions. Any other result would have been a clear miscarriage of justice. The constitutions of the state and Federal government are intended to act as a shield for the protection of the property rights against seizure by sovereign authority. They are not intended to operate as an instrument to permit the breach of solemn agreements voluntarily entered into between the property owner and the condemnor. In the present case the upholding of the agreement by the courts operates to do justice between the parties. The effect of the agreement is accurately characterized by the Appellate Court of Illinois after a painstaking consideration of the case upon the merits as follows (312 Ill. App. 126, 147):

> "The admission in evidence of the stipulation of October 6, 1930 did not constitute a collateral attack on the condemnation judgment, and to hold the Institute to the performance of its undertaking to remove the obstructions does not in any manner modify or contradict the condemnation judgment either as to its amount or its finality. It merely postpones plaintiff's

> right to demand the payment of the balance of its condemnation judgment until it performs its obligation to remove its buildings from the condemned portions of its property."

The Supreme Court of Illinois was satisfied with the decision of the Appellate Court and in its opinion fully recognized that under ordinary circumstances the condemnor is required to pay the judgment in order to fully satisfy the constitutional guaranty. We have above quoted the pertinent portion of its opinion. Notwithstanding the general rule, the Supreme Court properly considered the circumstances in this case as presenting an exception to the general rule (382 Ill. 70, 75):

> "But the City of Chicago and the plaintiff in error saw fit to enter into a written contract or stipulation wherein and whereby very substantial questions and differences of opinion were compromised, settled and agreed upon, which creates an entirely different situation from the facts set forth in the above mentioned cases."

The city has paid more than a half million dollars to the Institute for a 14 foot strip of land which it condemned, which even today still remains physically in the possession of the appellant, and upon which stands a portion of a very substantial building. It is this building which the appellant by solemn contract has agreed to remove before requiring payment of the award. Not satisfied with having received payment of over a half million dollars prematurely, the Institute in flagrant violation of its agreement, in the opinion of the state trial court and courts of review, stubbornly refuses to remove the buildings but insists upon payment of the balance of the award. Under these circumstances, it is utterly groundless to argue that the plaintiff has suffered infringement of its constitutional rights. More than that, it is downright legal hypocrisy.

It is respectfully submitted that the questions raised by the appellant on which the decision of the cause depends are so unsubstantial as not to need further argument. A motion to dismiss or affirm is therefore presented herewith.

Respectfully submitted,

BARNET HODES,
Corporation Counsel of the
City of Chicago,
Attorney for Appellees.
JOSEPH F. GROSSMAN,
First Assistant Corporation Counsel,
J. HERZL SEGAL,
Assistant Corporation Counsel,
Of Counsel.

APPENDIX "A".

Opinion of the Appellate Court.

Mr. Justice Sullivan delivered the Opinion of the Court.

The Moody Bible Institute of Chicago (hereinafter referred to as the Institute) filed a petition for mandamus against the City of Chicago and certain of its officials (hereinafter for convenience sometimes referred to collectively as the city) to compel payment of the balance of certain condemnation judgment awards and interest thereon, which judgment awards were entered on November 28, 1930, in a condemnation proceedings wherein property of the Institute was taken for public use by the city. The city and its officials admitted in their answer the entry of said judgment awards and the partial payments made on account of same, but denied any obligation to pay the unpaid balance of said awards because of the failure of the Institute to perform an agreement alleged to have been made by it to remove its property from the condemned portions of its land. The city filed an amended counterclaim wherein it averred petitioner's breach of the agreement to remove its property from the condemned portions of its land and claimed damages by reason thereof equivalent to interest on the amounts paid upon the judgment awards at the rate of 5% from the dates of payment. After a hearing by the court without a jury the issues raised by the petition for mandamus and the answer thereto were found in favor of the city. The issues presented by its amended counterclaim were found against the city. The city perfected its appeal to this court from that portion of the judgment order denying its counterclaim. Petitioner filed its notice of appeal to the Supreme Court from that portion of the judgment order denying its petition for mandamus. In the appeal taken by petitioner to the Supreme Court, that Court entered the following order: "In thise case it appears a prior appeal has been prayed to the Appellate court,

First District. This appeal is dismissed without prejudice." Petitioner then perfected a cross-appeal to this court from that portion of the judgment order of the trial court denying its petition for mandamus.

The following material facts appear from admissions made by the parties in their pleadings and from the evidence submitted at the trial. December 23, 1924, the City Council of the City of Chicago passed an ordinance pursuant to the Local Improvements act, which provided for the taking of certain property, including property owned by the Institute, for the purpose of making a public improvement on North LaSalle street. In accordance with the terms of said ordinance a petition for condemnation, entitled *City of Chicago* v. *McCluer et al.*, was filed by the city in the County court of Cook county. Said petition and proceeding involved the condemnation of fourteen feet of property on each side of North LaSalle street for the widening thereof from Ohio street north to North Clark street. The Institute owned three parcels of land on North LaSalle street near Chicago avenue, which was only a short distance from the south end of the widening project. Certain property owners, including the Institute, filed legal objections to the special assessments and the amounts of the proposed condemnation awards. After the county court overruled such objections, said property owners waived further controversy and judgment was rendered confirming the assessments against their property and the awards to them. Said judgment awarded compensation to the Institute aggregating $519,727 as to its three parcels of land. This judgment of the County court was appealed to the Supreme Court and affirmed (*City of Chicago* v. *McCluer*, 339 Ill. 610). The aforesaid property owners, including the Institute, filed "an appeal to and a petition for certiorari in the Supreme Court of the United States" to review the judgment of the Supreme court of Illinois. While said appeal and petition for certiorari were pending the city and the property owners effected a compromise and entered into the following written stipulation:

"State of Illinois,
County of Cook, ss:

In the Supreme Court of the United States.

October Term, A. D. 1930

No. 327

William B. McCluer, et al., *Appellants*,

v.

City of Chicago, *Appellee*.

It is hereby stipulated and agreed, by and between the parties hereto, that a careful investigation has been made of the awards heretofore allowed and the assessments confirmed, which investigation shows that the awards are considerably below a fair value and the assessments too high, as a result of which investigation the issues in the above entitled cause have been settled as hereinafter set forth in order that the awards and assessments may be fair and reasonable, which reasonable amount both parties agree are in accordance with the schedule hereto attached. In consideration of the settlement of the controversy by the entry of the findings and the judgment thereon as hereinafter set forth, the parties hereby agree that the appeal and the petition for a writ of certiorari in the above entitled case now pending in the Supreme Court of the United States shall be dismissed.

In consideration of said dismissals, and immediately upon the dismissals of the aforesaid causes and delivery to the Corporation Counsel of the City of Chicago of a copy of said orders of dismissal appellee agrees to set aside the verdicts and judgment order entered thereon in the County Court of Cook County, Illinois, as to the properties hereinafter described in the schedule hereto attached and made a part hereof, and after evidence presented, to enter findings and judgment thereon as to both awards and assessments which (subject to court approval) shall be in accordance with the amounts set up in said schedule, which schedule is hereto attached and made a part hereof.

Upon the entry of such findings and judgment order thereon, and the furnishing to the appellee evidences showing good title in the respective appellants to the properties described in said schedule, and the removal of all obstructions, or the submission to the Board of Local Improvements of a bona fide contract for their removal, from the part taken in such proceeding, said appellee agrees to pay in cash to the owners of the properties mentioned in said schedule the amounts originally allowed in said findings and judgment order as to each of them, deducting therefrom the assessments originally confirmed against each of the remainder of such properties.

Upon the payment to the appellants of amounts allowed in the original judgment order less the original assessments confirmed against each said properties in the assessment roll, the respective appellants agree to surrender to appellee the property taken in the above proceedings and described in the schedule hereto attached, and to have entered in the above proceeding an order, or orders, permitting the appellee to take possession of such properties for which awards have been allowed and part payment made.

Said appellants, and each of them, do hereby agree that in the event that any court or courts should decide that the appellee or any officials of said appellee be charged with the excess amount allowed to the said appellants over and above the amount in the original judgment order or/and the amount saved to the said appellants by reason of any reduction in the assessment beyond that already reduced and such decision or decisions be made final, the said appellants, and each of them, do hereby agree to reimburse the said appellee or any of its officials and to give a personal bond to the said appellee and its officials to hold them safe and harmless in case any judgment or judgments is entered against them or either of them because or on account of this stipulation. Appellee agrees that before there can be any liability on the part of appellants, appellants will be promptly notified of any attempt to impose such liability upon appellee or its officials are aforesaid, so that appellants may have full and complete opportunity to defend any such actions on their own behalf,

as well as on behalf of the appellee or its officials, as well as full opportunity to prosecute appeal.

It is further stipulated and agreed by and between the parties hereto that the appeal and petition for writ of certiorari above referred to are being dismissed solely in consideration of the entry of findings and judgment as hereinafter stated.

It is further understood and agreed that this stipulation is in the nature of a compromise, for the sole purpose of settling the issues between the parties, and cannot be used by either party in this cause except for the sole purpose of settlement in accordance with the terms hereof.

City of Chicago, Appellee. By Samuel A. Ettelson, Corporation Counsel.

Board of Local Improvements of the City of Chicago. By M. J. Faherty, President.

Gotthard A. Dahlberg, Attorney for the Board of Local Improvements of the City of Chicago.

Foreman Trust & Savings Bank, as Trustee, Albert Grosby, Alma Jevne, Henry M. Jevne and Clara Haugan, Louis Sakowski, Bertha L. Tessmer, Helen Brubaker, John J. Seideneck, Mary Pomeroy Green, Caroline H. Baumann, Hilda S. Hill, Grace Lane Beardsley, Melissa F. Hubbard, George W. Foster, Elinor F. McLaughlin and Mary S. Foster, Sole Heirs and Next of Kin of George A. Foster, Deceased, Edward Lindahl and John J. Weber, Trustees of the Estate of Deckra Aghasian, Deceased, Helen G. Hillis, Packard Motor Car Company of Chicago, a Corporation, William Lux, William G. Murray, Hanna Obermeyer, The Moody Bible Institute, a Corporation, the Moody Church, Sophie L. Peters, Frank Heckl and John B. Irwin, and Physicians and Surgeons Institution of Chicago, a Corporation, Appellants. By Howard F. Bishop, their Attorney.

I concur in this Stipulation
Eugene H. Dupee
October 6, 1930."

Appended to the stipulation was the following schedule:

Tract	Address	Award	Increased Award
299	1647-57 N. LaSalle St.	$55,367.	$86,500.
225	1323 N. LaSalle St.	3,450.	4,900.
227	1329 N. LaSalle St.	3,409.	4,900.
253	1441 N. LaSalle St.	6,107.	12,500.
115	1322-24 N. LaSalle St.	7,020.	9,850.
116	1328 N. LaSalle St.	3,194.	4,500.
109	1302 N. LaSalle St.	2,668.	3,500.
274	1557-59 N. LaSalle St.	7,285.	10,000.
110	1304-06-08 N. LaSalle St.	7,644.	12,000.
193	1111 N. LaSalle St.	26,831.	36,000.
184	1005 N. LaSalle St.	4,076.	9,500.
287	1640 N. LaSalle St.	4,762.	6,700.
283	1626 N. LaSalle St.	4,184.	5,300.
230	1335 N. LaSalle St.	3,114.	4,500.
198	1149 N. LaSalle St.	15,975.	21,000.
273	1555 N. LaSalle St.	6,396.	10,500.
174	911 N. LaSalle St.	36,280.	50,000.
19	748 N. LaSalle St.	20,595.	35,000.
285	1632 N. LaSalle St.	4,099.	5,500.
23	617 N. LaSalle St.	42,475.	52,500.
292	Moody Church	25,111.	50,111.
156	821 N. LaSalle St.	17,062.	30,000.
48	922 N. LaSalle St.	15,895.	29,000.
62	1030 N. LaSalle St.	7,364.	11,000.
157	827 N. LaSalle St.	8,016.	12,500.
279	1614 N. LaSalle St.	9,546.	17,500.
168	871 N. LaSalle St.	6,850.	12,000.
221	1261 N. LaSalle St.	16,244.	22,000.
124	1400 N. LaSalle St.	7,288.	11,000.
286	1634 N. LaSalle St.	4,379.	5,500.
134	1438 N. LaSalle St.	10,718.	26,500.
265	1519 N. LaSalle St.	4,202.	6,500.
272	1551 N. LaSalle St.	5,736.	8,100.
	Moody Institute Award to be increased		350,000.
	Assessment of Moody Institute and Moody Church to be reduced 50%.		

Pursuant to the foregoing stipulation of October 6, 1930, the appeal and petition for certiorari pending in the Supreme Court of the United States were dismissed and the city and the property owners on November 7, 1930, entered into the following stipulation, which was filed in the County courts

"It is hereby stipulated and agreed, by and between the parties hereto, by their respective attorneys, that the verdicts and judgments thereon as to the properties owned by the parties hereto be and the same are hereby vacated and set aside.

It is further stipulated and agreed that the election heretofore made by the respondents hereinafter named, to waive further controversy be and the same is hereby vacated and set aside.

It is further stipulated and agreed that as to all questions of benefits and awards, jury is hereby waived and the cause is hereby submitted to the Court."

The judgment referred to in the stipulation of November 7, 1930, was the original judgment of the County court, which was affirmed by the Supreme court of Illinois (*City of Chicago* v. *McCluer*, 339 Ill. 610) and which was involved in the appeal and petition for certiorari filed in the United States Supreme Court and the waiver of controversy referred to was the waiver of controversy made in the County court in 1928 in the *McCluer* case.

On November 8, 1930, the following order was entered in the County court of Cook county:

"This cause coming on this day to be heard upon the motion of the parties hereto by their respective attorneys, that certain verdicts and judgments be vacated and set aside;

"And the Court having heard the arguments of counsel, and being fully advised in the premises, finds that certain verdicts and judgments should be vacated and set aside;

"It is Therefore Ordered that the verdicts and judgments as to the properties owned by the following named parties [here followed names of owners, including the Institute] be and the same are hereby vacated and set aside.

"It is Further Ordered that the election heretofore made by said respondents to waive further controversy be and the same is hereby vacated and set aside.

"It is Further Ordered that upon the parties hereto having waived a jury, the cause as to the parties above named on all questions of award and benefits is hereby submitted to the Court."

In November 28, 1930, in a trial by the court without a jury and after evidence heard the County court entered a judgment awarding compensation to the Institute, aggregated $869,727 as to its three parcels of land. These awards to the Institute represented an increase of $350,000 over the original aggregate award of $519,727, which increase was identical in amount with the increase award provided for in the stipulation of October 6, 1930. On November 29, 1930, petitioner acquired by assignment a judgment award of $26,500, also entered November 28, 1930, as to a fourth parcel of land involved in the North LaSalle street condemnation proceeding.

As to the three parcels of land owned by petitioner from the inception of the condemnation proceedings, the city made partial payments to the Institute on the final judgment awards of November 28, 1930, in the amounts and on the dates set forth in the following schedule:

Parcel No.	Partial Payment	Date of Partial Payment.
1	$387,552.00	January 26, 1931
2	30,225.00	March 20, 1931
3	101,950.00	January 6, 1931

These partial payments aggregated $519,727, the exact amount of the original awards as to these three pieces of property. On April 2, 1931, the city made a partial payment of $10,718 on the Institute's subsequently acquired judgment award.

Michael J. Faherty, who was president of the Board of Local Improvements of the City of Chicago when the foregoing occurrences took place and the above partial payments made, testified in the instant case that it was

an advantage to the city to have the property owners themselves remove their buildings from the condemned portions of their land because the city would thereby avoid liability for any damages that might ensue if it undertook such removal; and that he insisted that the Institute comply with the provisions of the stipulation of October 6, 1930, pertaining to the removal of its buildings from the condemned portions of its property before he would approve the foregoing partial payments on the final condemnation judgment. As a result of Mr. Faherty's insistence in this regard, he received the following letter:

"Office of President of the Institute,
December 30, 1930.

The Honorable Michael J. Faherty,
President of the Board of Local Improvements,
City Hall, Chicago, Ill.

DEAR SIR:

We hereby undertake and agree that as soon as we receive the partial payments equivalent to the original awards, for all of the Moody Bible Institute properties in the LaSalle Street condemnation proceedings, we shall arrange to have (free and clear of any contractor's lien) the buildings removed from the fourteen feet condemned.

Very truly yours,

JAMES M. GRAY,
President."

It was admitted upon the trial that when James M. Gray wrote this letter he was president of the Institute and that it was his signature that was attached thereto, but counsel for petitioner refused to admit that it was Gray's signature as president of the Institute.

In conformity with the stipulation of October 6, 1930, the following communication was also delivered to Mr. Faherty by a trustee of the Institute and one of the persons whose signatures are attached thereto.

Chicago, December 31, 1930.

Honorable Michael J. Faherty,
President, Board of Local Improvements,
Chicago, Illinois.

DEAR SIR:

We, the general contractors employed by The Moody Bible Institute of Chicago to remove and alter their several buildings on North LaSalle Street in accordance with the demands required for the widening of North LaSalle Street, do hereby agree to hold The Moody Bible Institute responsible for all moneys payable and will not look to the City of Chicago for any reimbursements on account of the above contract work, agreeing also not to encumber any of the properties with mechanics' liens. The above contract refers to the following buildings: (which are all The Moody Bible Institute buildings)

900-2-4-6 North LaSalle Street, which are 4- and 6-story buildings;
851 North LaSalle Street, the building on the Northeast Corner of West Chestnut and LaSalle Street;
830 North LaSalle Street:
The auditorium building on the Northwest Corner of Chicago Avenue and LaSalle Street;
1438 North LaSalle Street;
Houses between Auditorium building and 830 N. LaSalle St.

As general contractors we agree to commence work within twenty-four hours after all the partial payments of all the awards have been made by the City of Chicago to The Moody Bible Institute of Chicago (by partial payments is meant that part of the award on each property equivalent to the original judgment) and to complete same within sixty days from the date of commencement, except as to the 8-story building at 830 North LaSalle street, which, on account of its character and construction may require additional time, but at any rate not more than one hundred twenty days.

(Signed) Nelson Building Construction Co.
(Signed) By Andrew Nelson, Pres.
(Signed) J. W. Snyder Co.
(Signed) By J. W. Snyder."

Mr. Faherty further testified that he also demanded from the Institute the indemnity agreement provided for in the stipulation of October 6, 1930, before he would approve the partial payments on the final compensation awards. The Moody Bible Institute by its president and secretary executed the indemnity agreement on December 12, 1930, and delivered same to the City of Chicago.

It was only after it had received the letter from Gray to Faherty, the letter from the contractors to Faherty and the indemnity agreement that the city made the partial payments to the Institute to the extent of $519,727 on its final awards as to its three parcels of land. After said partial payments had been received by the Institute it failed and refused to remove its buildings from the condemned portions of its property. The city proceeded with and completed the paving portion of its widening project but was unable to proceed with the sidewalk portion thereof in front of the premises owned by the Institute. In November, 1931, the city was compelled to condemn and have removed the building on one of the parcels of land owned by the Institute because of its hazardous condition. Thereafter a sidewalk was built in front of this parcel.

In an attempt to prove in the instant mandamus proceeding that the written stipulation of October 6, 1930, did not contain all of the terms of the agreement between the Institute and the city, especially as to that part of said stipulation which related to the removal of the Institute's buildings from the condemned portions of its property, Howard F. Bishop, the attorney for petitioner, offered in evidence certain documents which were excluded upon the city's objection. It should be noted at this point that Samuel A. Ettelson was the corporation counsel of the city when the stipulation of October 6, 1930, was executed and that because of a change in the city administration he was succeeded in that office by William H. Sexton in April, 1931. One of the documents offered in evidence by petitioner was a letter dated April 5, 1932, from Sexton to Ettelson, to which was attached a letter from Howard F. Bishop to Sexton dated March 11, 1932. Attorney Bishop's letter was in substance a statement of his conception of what he termed the complete agreement between the city

and the Institute covering, among other matters, the removal of the Institute's buildings from the condemned portions of its property. The letter from Sexton to Ettelson requested the latter to state "whether or not you did in behalf of the city make the agreement as recited in Mr. Bishop's letter." Another of the rejected documents offered by petitioner was Ettleson's letter of April 15, 1932, in reply to Sexton's letter, which stated in part: "I am familiar with the situation and took part in the conferences referred to in your letter and in the letter of Mr. Bishop for the purpose of settling and adjusting the matter upon lines that I regarded to be for the best interests of the city. I have read Mr. Bishop's letter to you very carefully and it accords with my recollection and understanding in regard to the agreement that a general judgment should be taken against the city for the increase in awards, interest, damages, and cost of removal as described in Mr. Bishop's letter. It was unfortunate, of course, that there wasn't sufficient money to pay these awards in full."

The other document which was offered in evidence by petitioner and excluded was a memorandum dated January 9, 1935, from Joseph F. Grossman, first assistant corporation counsel, to William H. Sexton, corporation counsel, to which memorandum was attached a computation of interest and also an unsigned statement submitted by Mr. Bishop again proposing a settlement between the Institute and the city.

All the foregoing documents offered in evidence by the petitioner were properly excluded by the trial court. After several conferences between the attorney for petitioner and William H. Sexton, the then head of the law department of the city, in an effort to settle the claims advanced by petitioner to the end that the Institute's property would be cleared so that the improvement might be completed, Corporation Counsel Sexton requested Attorney Bishop to address a letter to him "setting out his contentions." This is the letter which Sexton received from Attorney Bishop and attached to his own letter to Ettelson, and, inasmuch as it consisted entirely of self serving declarations and was submitted merely as a part of negotiations

for a compromise which was never consummated, it was clearly inadmissible in evidence. It was as to the contents of this letter that Sexton requested information from Ettelson, his predecessor as corporation counsel for the city. Inasmuch as the statements in Ettelson's letter to Sexton were made concerning the self-serving declarations contained in Attorney Bishop's letter and inasmuch as Ettelson had no official connection with the city when he wrote the letter, the statements contained therein could in no wise be construed as admissions by the city. All this correspondence was merely part of the investigation conducted by Sexton in his endeavor to ascertain if there was any merit to the claims advanced by petitioner. It all had to do with the Institute's unsuccessful attempt to compromise such claims and it was therefore incompetent and inadmissible.

Since Attorney Bishop's written statement of December 10, 1934, entitled "Reference Proposed LaSalle Street Settlement" was purely a proposal of settlement and since Grossman's letter of January 9, 1935, to Corporation Counsel Sexton, to which the Bishop statement was attached, was an interoffice memorandum concerning such proposal, neither of such documents were admissible in evidence inasmuch as they both related to negotiations for compromise and settlement. Since offers to compromise or proposals of settlement, which are not accepted, having no binding force, they cannot be considered competent evidence.

Petitioner first contends that "it did not agree to remove the buildings from the part condemned at its own expense, and, further, that the stipulation of October 6, 1930, does not impose any such obligation upon the Institute. It is further contended that said stipulation does not contain the entire agreement between the City of Chicago and the Institute." We are concerned primarily with the question as to whether that stipulation did contain the sole and complete agreement between the parties as to the removal of the Institute's buildings from the condemned portions of its premises. It is fitting that the stipulation be analyzed as to the obligations contained therein and the

manner in which they were to be and have been performed. It will be noted that attorney Bishop executed this stipulation on behalf of the property owners involved, including the Institute, and that it was concurred in by Attorney Eugene H. Dupee. The stipulation states that it "is in the nature of a compromise for the sole purpose of settling the issues between the parties."

Just what matters were covered by the stipulation and to what extent were the obligations thereunder of the respective parties performed?

The Institute agreed to dismiss "its appeal and petition for certiorari" then pending in the Supreme Court of the United States. It did that.

The city agreed to vacate the original judgment awards in the County court. It did that.

The city agreed to permit a judgment to be entered against it in the County court increasing the aggregate award to the Institute by $350,000 and reducing its assessments 50%. It did that.

The city agreed to make partial payments to the Institute of $519,727, the amount of the aggregate of the original awards upon the entry of the final condemnation judgment in the County court and "the submission to the Board of Local Improvements of a bona fide contract by the Institute for "the removal of all obstructions" from the condemned portions of its land. The city made such payments.

The Institute agreed to deliver to the city a contract of indemnity. It did that.

The Institute agreed that before it was entitled to receive the partial payments on its final awards it had to furnish evidence to the city of "the removal of all obstructions, or the submission to the Board of Local Improvements of a bona fide contract for their removal from the part taken in such proceeding." It delivered to the city the contract heretofore set forth for the removal of the obstructions.

The Institute agreed that when the city made the partial payments to it on account of the final awards, it would surrender to the city the condemned portions of its property and have an order entered in the county court per-

mitting the city to take possession of such property so that it could complete its improvement. The Institute did not comply with its agreement in this respect, because it repudiated its obligation under the stipulation to remove or have removed its buildings from the condemned portions of its land.

The provision of the stipulation of October 6, 1930, pertaining to the removal of the obstructions from the condemned portions of petitioner's property is open to no other construction than that the Institute assumed the obligation of removing such obstructions at its own expense. If there was any possible doubt concerning the meaning of such provision or the intention of the parties as to same, it would necessarily have to be resolved against the Institute in view of the interpretation placed upon it by its own officers, as evidence by the delivery of the letter of Gray, its president, and the contract for the removal of the obstructions to President Faherty of the Board of Local Improvements. Both of these documents show conclusively that the officers of the Institute clearly understood after the final judgment awards were entered and before the partial payments were made on same that the Institute was obligated to remove the obstructions at its own expense before it was entitled to receive said partial payments from the city. The only other conclusion possible is that when Gray wrote the letter to Faherty on December 30, 1930, stating that, "We shall arrange to have (free and clear of any contractor's liens) the buildings removed from the fourteen feet condemned," and that when one of the trustees of the Institute delivered the removal contract dated December 31, 1930, to Faherty, containing the statement that the contractors "agree to hold The Moody Bible Institute responsible for all moneys payable and will not look to the city of Chicago for any reimbursement on account of the above contract work," the officers of the Institute intended to practice a deliberate fraud upon the city in order to secure the partial payments. We prefer to believe that said officers at that time recognized the obligations of the Institute under the stipulation of October 6, 1930, to remove the obstructions at its own expense, and fully intended to

perform same but that they were improperly dissuaded from so doing.

As has been seen the stipulation of October 6, 1930, was a contract complete in itself as to all matters covered therein and we have a situation presented where the city performed all its obligations under such stipulation and the Institute wrongfully refused to perform its obligation to remove its buildings from the condemned portions of its land. In view of the agreement by the city in the stipulation of October 6, 1930, to increase the original awards to the Institute of $519,727, which awards had been affirmed by the Illinois Supreme court, by the not inconsiderable amount of $350,000, the agreement on the part of the Institute to remove its buildings from the condemned portions of its premises at its own expense was surely not unreasonable. There is evidence in the record that the cost of such removal would have been approximately $42,000.

Petitioner next contends "that the admitted, final and unconditional condemnation judgment of the county court is conclusive in this mandamus proceeding and cannot be varied or contradicted in any respect by extrinsic evidence; that the introduction in evidence of the stipulation of October 6, 1930, constitutes an outright collateral attack on the terms and provisions of the judgment itself which, under the law of this state, cannot be permitted."

The insistence by the city that the Institute perform its agreement and comply with its obligation to remove its buildings at its expense from the condemned portions of its properties before it is entitled to compel the city to pay the balance of the condemnation awards does not question the unconditional character or the finality of the condemnation judgment. It must remembered that the attorney for the Institute signed the stipulation of October 6, 1930, in its behalf. This instrument as stated therein was "in the nature of a compromise" and it constituted a valid and binding contract between the parties thereto. The obligation therein of the Institute to remove the obstructions was just as material as was the obligation of the city to procure the vacation of the earlier condemnation judgment and the entry of the later

judgment for the increased awards. The agreement by the Institute to remove the obstructions constituted a substantial part of the consideration for the obligations undertaken by the city in the stipulation. It is idle to urge that because said obligation of the Institute was not made a part of the record in the proceeding that resulted in the judgment for the increased condemnation awards or that same was not made a part of the judgment itself that that portion of the stipulation of October 6, 1930, containing the obligation of the Institute to remove its buildings at its expense from the condemned portions of its property was merged in the condemnation judgment. While it would have been safer practice in view of all that has occurred since, if the city as a matter of protection against such a contention as is now advanced in behalf of the Institute had made the stipulation a part of the record in the condemnation proceeding, it by no means follows that the city should be deprived of a substantial right under said stipulation because of its failure to incorporate same in such record. In our opinion the agreement of the Institute to remove the obstructions being an entirely distinct and separate undertaking from that of the city to permit the entry of the condemnation judgment for the increased awards, it was neither merged in the condemnation judgment nor rendered ineffective, invalid or unenforceable by reason of the entry of said judgment. The Institute by its then and present attorney voluntarily and for a valuable consideration entered into a valid and binding contract on October 6, 1930, and that contract is just as valid and binding now as it was then.

The admission in evidence of the stipulation of October 6, 1930, did not constitute a collateral attack on the condemnation judgment and to hold the Institute to the performance of its undertaking to remove the obstructions does not in any manner modify or contradict the condemnation judgment either as to its amount or its finality. It merely postpones plaintiff's right to demand the payment of the balance of its condemnation judgment until it performs its obligation to remove its buildings from the condemned portions of its property.

The city filed an amended counterclaim which alleged *inter alia:*

"Defendants aver that said City of Chicago made partial payments on account of said judgments * * *. Relator immediately returned to said City of Chicago from the proceeds of said payments the amount of benefits assessed and adjudged against the parcels of land described in said petition and the net amount paid by said defendant to and retained by the relator after deducting the amount of benefits assessed and adjudged against said parcels of land are as follows:

Parcel No.	Net Amount Paid	Date of Payment
1	$347,667.00	January 8, 1931
2	25,964.50	March 25, 1931
3	90,677.00	January 8, 1931
4	10,718.00	April 2, 1931

"Defendants further aver that by reason of the failure and refusal on the part of said relator to remove the buildings and obstructions upon the condemned portion of its properties or the submission to the Board of Local Improvements of a bona fide contract for their removal, said relator has breached the said agreement dated October 6, 1930, and the said defendant has been wrongfully deprived of the use of the moneys paid on account of said judgments as aforesaid and is therefore entitled to recover damages equivalent in amount to interest upon said amounts at the rate of 5% per annum upon the respective amounts from the respective dates of payment."

Included in the judgment order from which this appeal is taken is the following finding:

"That the evidence introduced in support of said counterclaim is insufficient to support the counterclaim sued upon and that the partial payments made by the defendant City of Chicago were required to be made at the times they were made and City of Chicago is not entitled to recover any damages on account of the counterclaim as amended."

The city concedes that it did not and could not prove any actual damages but insists that since the Institute

breached its agreement of October 6, 1930, to remove its buildings from the condemned portions of its property and turn such portions over to it, it is entitled to recover damages equivalent in amount to interest upon the partial payments made to the Institute at the rate of 5% per annum from the respective dates of said payments. We are in accord with the foregoing finding of the trial court as to the counterclaim and find no warrant in law for the allowance of the damages claimed by the city.

Plaintiff's motion heretofore made to transfer this appeal to the Supreme Court, which was reserved to hearing is at this time denied.

No clear right to the issuance of a writ of mandamus having been etsablished the judgment of the Superior court is affirmed.

Other points have been urged and considered but in the view we take of this case we deem further discussion unnecessary.

Judgment Affirmed.

Scanlan, P. J., and Friend, J., concur.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1942

No. 1086

Appeal from the Supreme Court of Illinois, No. 26665

The People of the State of Illinois on relation of THE MOODY BIBLE INSTITUTE OF CHICAGO, a corporation not for profit, *Appellant*,

vs.

CITY OF CHICAGO, a municipal corporation, et al., *Appellees*.

MOTION OF APPELLEES TO DISMISS OR AFFIRM.

May it Please the Court:

Come now the City of Chicago, a municipal corporation, et al. appellees herein, by Barnet Hodes, Corporation

Counsel, and move the court to dismiss with costs the appeal taken herein to this court by The Moody Bible Institute of Chicago, a corporation, appellant, upon the following grounds:

1. The decision of the Supreme Court of Illinois was based primarily on local law and questions of local law are not open to reexamination in this court.

In the alternative, appellees move this court to affirm the judgment of the Supreme Court of Illinois on the following grounds:

1. No substantial Federal question affording a basis for a review by this court is presented by the appellant.

2. The Federal question which appellant attempts to raise in this court is foreclosed by the prior decisions of this court.

Respectfully submitted, Barnet Hodes, Corporation Counsel of the City of Chicago, Attorney for appellees.

Joseph F. Grossman, First Assistant Corporation Counsel; J. Herzl Segal, Assistant Corporation Counsel, of Counsel.

DECISIONS PER CURIAM, ETC., FROM OCTOBER 4, 1943, THROUGH JANUARY 10, 1944.*

No. 95. MOODY BIBLE INSTITUTE *v.* CHICAGO. Appeal from the Supreme Court of Illinois. October 11, 1943. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of jurisdiction. § 237 (a) of the Judicial Code, as amended, 28 U. S. C., § 344 (a). Treating the papers whereon the appeal was allowed as an application for writ of certiorari as required by § 237 (c) of the Judicial Code, as amended, 28 U. S. C., § 344 (c), certiorari is denied. *Mr. Howard F. Bishop* for appellant. *Messrs. Barnet Hodes, Joseph F. Grossman,* and *J. Herzl Segal* for appellee. Reported below: 382 Ill. 70, 46 N. E. 2d 918.